considered in connection with other evidence in the record. But, we think, this writing is something more than an admission, and stands in a different light from an ordinary receipt. The writing must be treated as the contract of dissolution, between the plaintiff and the society, of their mutual obligations and engagements to each other. No evidence of prior declarations or antecedent conduct is admissible to contradict or to vary it.

It was prepared to preserve the remembrance of what the parties had prescribed to themselves to do, and expresses their intention in their own language; and that such was its object, is corroborated by the fact that for three years there is no evidence of a contrary sentiment. Treating this writing as an instrument of evidence of this class, it is clear that the bill has not made a case in which its validity can be impeached. To enable the plaintiff to show that the rule of the leader, (Rapp,) instead of being patriarchal, was austere, oppressive, or tyrannical; his discipline vexatious and cruel; his instructions fanatical, and, upon occasions, impious; his system repugnant to public order, and the domestic happiness of its members; his management of their revenues and estate rapacious, selfish, or dishonest; and that the condition of his subjects was servile, ignorant, and degraded, so that none of them were responsible for their contracts or engagements to him, from a defect of capacity and freedom, as has been attempted by him in the testimony collected in this cause, it was a necessary prerequisite that his bill should have been so framed as to exhibit such aspects of the internal arrangements and social and religious economy of the association. This was not done; and for this cause the evidence cannot be considered. The authorities cited from the decisions of this court are decisive. Very *v.* Very, 13 How., 361, 345; Patton *v.* Taylor, 7 How., 157; Crockett *v.* Lee, 7 Wheat., 525.

Decree reversed. Bill dismissed.

JAMES MEEGAN, PLAINTIFF IN ERROR, *v.* JEREMIAH T. BOYLE.

In Missouri, where a deed was offered in evidence, purporting to convey the titles of married women to land, and their names were in the handwriting of other persons, and there was no proof that the women had either signed or acknowledged the deed, it was properly refused by the court to be allowed to go to the jury.

The property was paraphernal, and could not be conveyed away by their husbands.

The facts in the case were not sufficient to warrant the jury to presume the consent of the married women.

The original deed not being evidence, a certified copy was not admissible.
An old will, which had never been proved according to law, was properly excluded as evidence. Moreover, no claim was set up under it, but, on the contrary, the estate was treated as if the maker of it had died intestate.
Neither the deed nor the will come within the rule by which ancient instruments are admitted. It only includes such documents as are valid upon their face.
The statute of limitations did not begin to run until after the disability of coverture was removed.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

Boyle, who was a citizen of Kentucky, brought an action of ejectment against Meegan, to recover a lot within the present limits of the city of St. Louis, in Missouri, which was particularly described in the declaration. There was no dispute about location, and both parties claimed under the title of Francis Moreau. The lot was recommended for confirmation by Recorder Bates, in 1815, and confirmed to Moreau's representatives (he being then dead) by the act of Congress passed on the 29th of April, 1816.

Boyle alleged that a portion of the title remained in Moreau's descendants until 1853, when it was levied upon under a judgment, and sold to him at a sheriff's sale. On the other hand, it was the effort of Meegan to show that these descendants had parted with their title by deed, or that Moreau had willed away the property a long time before the sheriff's sale. The portion of the title which Boyle claimed was the entire share of Angelique, one of Moreau's daughters, who married Antoine Mallette, about 1804 or 1805; the shares of two of Moreau's grand-daughters, being the children of his daughter Helen, who had married Pierre Cerré, said grand-daughters having married, one of them Pierre Willemin, and the other Felix Pingal. Boyle also claimed the derivative share which these persons were entitled to as the heirs of two of Moreau's children, whose title was alleged to have remained vested in them at their deaths, without issue. One of these deceased children was Marie, who had married Collin.

The judgment under which Boyle claimed was recovered, in 1852, against Angelique Mallette, then a widow, (the daughter of Moreau,) Pierre Willemin and Melanie Cerré, his wife, (a grand-daughter of Moreau,) and Felix Pingal and Josephine Cerré, his wife, (another grand-daughter of Moreau.)

Upon the trial, Boyle offered in evidence the certificate of the recorder of land titles in Missouri, the survey, the confirmation, and the pedigree of Moreau's family, with the dates of the deaths which had taken place. He then gave in evidence the sheriff's deed to himself, and proved that Meegan had been in possession of the premises since 1839.

The line of defence was to show that the title had passed out of Moreau's heirs to a person named Chouteau, and from him to Mullanphy, who had been in possession since 1820. For this purpose, a paper was offered in evidence, purporting to be a deed from Moreau's heirs to Chouteau, dated September 3d, 1818. It had attached to it the names of three of the daughters of Moreau, (amongst other signatures,) viz: Marie Collin, Angelique Moreau, and Ellen Moreau. It had also the signatures of the husbands of the two last, viz: Antoine Mallette, the husband of Angelique, and Pierre Cerré, the husband of Ellen or Helen. Marie Collin's name was written; the others made their marks. It was proved that her name was in the handwriting of her husband, Louis Collin; the names of Antoine Mallette and Pierre Cerré were in the handwriting of Guyol, and that of Ellen Moreau, the wife of Pierre Cerré, was in the handwriting of Hawley. John O'Fallon testified that he became the executor of Mullanphy in 1833, and that this deed was received by him amongst the other title-papers of Mullanphy. The defendant then offered to read the deed in evidence.

To the admission of which the plaintiff objected, because the deed was not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, under whom he claims, and because there was no proof that it had been executed by them under whom he claimed, and because the deed did not convey or pass the title of Mrs. Collin, Mallette, and Cerré, under whom he claims; which objections were sustained by the court, and the same was not admitted in evidence; to which ruling of the court the defendant excepted.

The defendant was allowed to read in evidence a deed from Chouteau and wife to Mullanphy, dated 30th October, 1819, to which the plaintiff did not object, because, if Chouteau had no title, he could convey none to Mullanphy.

The defendant then offered a certified copy of the deed from Moreau's heirs to Chouteau, to the admission of which the plaintiff objected, for the same reasons urged against the original deed. The objection was sustained, the copy excluded, and the defendant excepted.

The defendant then offered a paper purporting to be the will of Francis Moreau, executed on 2d of August, 1798, before sundry official persons, by which he made his son, Joseph Moreau, his universal legatee.

To the admission of which the plaintiff objected, because the will had not been probated or proved in any lawful manner; because the conditions were not proved to have been complied with; because the Spanish law authorized no such disposition

of property as therein made; and because there was evidence before the court to show that the devisee had not accepted the estate under the will, but had renounced it, which objections to the will were sustained by the court, and the will was not admitted in evidence, to which ruling of the court the plaintiffs then and there excepted. At the same time the will was offered, sundry deeds and documents were read in evidence, the purport of which was to show that the estate of Francis Moreau was treated, after his death, as if he had died intestate.

The defendant then prayed the court to give the following instructions to the jury:

1. If the jury find that Francis Moreau, in his lifetime, was the owner of the lot in controversy, that he died prior to 1804, and that his two daughters, Mrs. Mallette and Mrs. Cerré, took their husbands prior to 1804, then the several interests of said daughters in said lot became, upon their marriage, and was their paraphernal property.

2. If the jury find as mentioned in instruction No. 1, and further find that, in the year 1818, Mallette and Pierre Cerré, husbands of said daughters, made the deed read in evidence by the defendants, then, under the evidence in this cause, the jury may presume that said daughters gave the administration of said paraphernal property to their husbands, and that the same was alienated with their consent.

3. If the jury find as mentioned in instruction No. 1, and further find that the defendants and those under whom they claim have had open and continued possession of the lot in question for thirty years and more before the bringing of this suit, claiming to own the same, then the plaintiff cannot recover any interest in said lot, derived by Mrs. Mallette or Mrs. Cerré from their said father.

If Mrs. Pingal was dead, leaving a child, at the time of the sheriff's sale, under which plaintiffs claim, and during all the time of the coverture of said Mrs. Pingal, the lot in controversy was in the possession of the defendants, and those under whom they claim holding the same adversely to Mrs. Pingal and her husband, and there never was any entry on the part of the wife or husband, then the plaintiff derived no title to the lot in controversy, under Mrs. Pingal or her husband.

The court gave the instruction No. 1, and refused the others, whereupon the defendant excepted.

The jury found the following verdict:

"We find the defendant guilty of the trespass and ejectment complained of, as to two-fifths undivided of all the block of land, part of the premises demanded, lying in the city of St.

Louis, bounded north by the north line of the Moreau arpent, being survey No. 1,480; south by the south line of said survey, 1,480; east by Seventh street; west by Eighth street, excepting only the two lots No. 7 in said block, as shown by the proceedings in partition between the heirs of John Mullanphy, deceased; and we assess the plaintiff's damages, sustained by the plaintiff by the said trespass and ejectment, at the sum of ten dollars, and find the monthly value thereof to be one dollar; and the defendant is not guilty as to the residue of the premises demanded."

The case was argued in this court by *Mr. Geyer* for the plaintiff in error, and *Mr. Williams* and *Mr. Crittenden* for the defendant.

Mr. Geyer made the following points:

The plaintiff in error submits that the Circuit Court erred in rejecting the documentary evidence offered by him at the trial.

1. The instrument, purporting to be the deed of the heirs of Moreau to Chouteau, dated 3d September, 1818, and that offered as the act of Pierre Reaume and wife, dated 6th November, 1819, ought to have been admitted in evidence.

The execution of the last-mentioned deed was fully proved by proof of the death of the subscribing witnesses and their handwriting. (See Sarpy's evidence, p. 17.)

Both instruments were more than thirty years old at the time of the trial, and proved themselves. The bare production of them was sufficient to entitle them to be read as the deeds of the parties whose acts they purport to be. (1 Greenl. Ev., sec. 21, p. 142.)

The presumption of the due execution of these instruments is moreover corroborated by the facts and circumstances in evidence at the trial: 1. It is proved that several of the parties collected at St. Louis from other places, for the purpose of making a conveyance of their interest in the land, at about the time of the date of the first instrument, and afterwards declared that they had sold to Pierre Chouteau. 2. The existence of the deed soon after is established by the official certificates appended. 3. The title of Chouteau, as derived from the heirs of Moreau, is recited in his deed to Mullanphy, executed, acknowledged, and recorded, in 1819. 4. Both the instruments rejected by the court were recorded in the proper office, and were in the possession of Mullanphy, under whom the defendant below claimed more than thirty years before the trial. 5. Mullanphy, the grantee of Chouteau and those claim-

ing under him, have been in undisturbed possession of the land, claiming under those deeds, more than thirty years. 6. All the parties grantors, except Alexis and Joseph Moreau, resided in the county of St. Louis, and no one of them ever set up a claim to the land. (See 1 Greenl. Ev., sec. 21, pp. 143, 144, 570, and cases there cited; Gray *v.* Gardner, 3 Mass. R., p. 399; Coleman *v.* And., 10 Mass. R., p. 105; Spoler *v.* Brown, 6 Binney, p. 435; Lee *v.* Tapscott, 2 Wash. R., 276; Doe ex dem. Clinton *v.* Phelps, 9 Johns., p. 169; Same *v.* Campbell, 10 do., p. 475; Newman *v.* Studley, 5 Mo. R., p. 291.)

If the antiquity of the instrument, together with the facts and circumstances disclosed at the trial, were not absolutely conclusive of their due execution, they at least afford a fair and reasonable presumption of that fact, and ought to have been referred to the consideration of the jury, to whom alone it belonged to determine upon the precise force and effect of the circumstances proved, and whether they were sufficiently satisfactory and convincing to warrant them in finding the fact. (1 Phillips Ev., p. 437.)

The fact, if it had been found by a jury, or admitted, that the deed of 3d September, 1818, was "not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, and had not been executed by any person under whom the plaintiff claims," would not authorize the rejection of the deed: it being admitted, and very fully proved, that it was duly executed by other parties having title as tenants in common in the land.

The plaintiff exhibited no conveyance or other evidence of title from Marie Collin; and, if her interest was not conveyed by the deed of 1818, it passed on her death (she having died without issue) to her brothers and sisters, and their descendants. Nor does he derive title under Angelique Mallette, or Helen Cerré, by any act of theirs, or of their representatives. His claim is founded on a sheriff's sale on execution (without any judgment produced) against Angelique Mallette, Pierre Willemin, and Malanie Cerré, his wife, Felix Pingal, and *Josephine Cerré, his wife*, by her guardian, which Malanie and Josephine are two of three surviving children of Helen Cerré. The latter, *Josephine*, was probably dead at the time of the sale, and, if living, an infant. At most, the plaintiff could claim only one share and two-thirds of another. And it was competent for the defendant to give in evidence conveyances from the other parties in interest.

The deed of 3d September, 1818, was duly acknowledged by Joseph Ortiz, and Eleanor, his wife, Joseph Minard, Auroria,

his wife, and the execution of it was proved at the trial by proof of the handwriting of Thomas R. Musick, in whose presence it was signed and acknowledged. The execution of the deed of Reaume and wife is proved beyond controversy. Joseph Minard, Eleanor Ortiz, and Marceline Reaume, are the children and heirs of Marie Louise Minard, deceased, who was a daughter of Francis Moreau, and wife of Joseph Minard, deceased.

The execution of the same deed by Alexis Moreau, and by Joseph Moreau, is established by the evidence of Osille Andre, the widow of Alexis Moreau, and by the declarations of both Alexis and Joseph, in the presence of other witnesses.

But it is sufficient, if the deed was executed by any one of those having title under Francis Moreau, to entitle the defendant to read it in evidence. If admitted, the plaintiff could not have recovered, there being no proof of an actual ouster, or any act equivalent. (Rev. Code of Mo., 1845, Tit. Ejectment, s. 11.)

2. The will of Francis Moreau, being one of the archives of the Spanish Government deposited in the office of the recorder of St. Louis county, and therein recorded and duly certified, was competent evidence by the statute law of Missouri. (Rev. Code, 1845, Tit. Evidence, s. 12.)

This document is what is called an open testament, being dictated *viva voce.* It was made before the commandant in lieu of a notary, in the presence of a sufficient number of witnesses, and afterwards deposited and preserved among the archives of the Government, and needed no probate to give it effect. (Partidas, L. 3, T. 1, b. 6; Novis'a Recop., L. 1, T. 18, b. 10; Schmidt's Civil Law, Tit. 7, chapter 5.)

In Upper Louisiana, the commandants of the posts, or some one designated by the Lieutenant Governor, were substituted for the notaries, and their acts have always been regarded as notarial acts, and of the same effect. (See McNare *v.* Hunt, 5 Mo. R., 300.)

The will contains no condition precedent to the operation of the clause by which Joseph Moreau is instituted universal heir, and if it did, proof of performance would not be a necessary preliminary to the admission of the document in evidence. The will is not void on account of the institution of a universal heir—the effect is only to give to him that portion of the estate disposable by testamentary donation, which in this case is one-third; the residue will pass to the heirs *ab intestato.* The acceptance of the donation by the instituted heir is not more necessary than the acceptance of the succession by the legal heirs—in either case, it may be express or implied—and when

material, is a question of fact for the jury. (Schmidt's Civil Law, Tit. 7, ch. —, art. 1059; chap. 8, art. 1177, Tit. 8. c. 5; Novis. Recop., L. 1, T. 18, b. 10; 18th Law of Toro.; Partidas, L. 11, 13, 15, Tit. 6, b. 6.)

The following points are taken from the brief of *Mr. Williams*, counsel for defendant in error:

It was conceded at the trial, that the property vested in the daughters in this way was *paraphernal*, according to the code of laws lately prevailing here. "A succession accruing to the wife during marriage is her paraphernal property, which she may administer without the authorization, consent, or interference, of her husband." (Flower *v.* O'Conner, 8 Martin, n. s., 556; Savenat et al *v.* Le Breton, 1 Lousi. R., p. 520.) This species of property could not be sold by the husband without the consent of the wife. (O'Conner *v.* Barre, 3 Martin, Lousi. R., 455.) The property a woman inherits during marriage is paraphernal. (Allen *v.* Allen, 6 Rob. R., 104.) The woman is accustomed to bring, besides her portion, (dot,) other property, which is called *paraphernalia*, and which is, or *are*, the property and things, whether (muebles) personal or (rèeles) real, which wives retain for their separate use. From this definition, it follows: 1. That if the wife gives to the husband this property, with the intention that he may have the dominion (senorio) of it, he shall possess it during marriage; and if she should not do this expressly in writing, the dominion of such property shall always be in the wife. (1 White's New Recopilacion, p. 56.) On same page, Note 33, it is said that Palacios questions the necessity of a writing, but says it *must appear that the wife made a gift to her husband*, with the intention of giving him dominion over it.

2. The supposed deed of Angelique Mallette, Marie Collin, and Helen Cerré, was properly excluded from the jury as a conveyance of their property.

1. The supposed deed was not valid under the Spanish law, as to Marie Collin, because her husband did not execute it.

2. It was not valid as to either of the women, because it does not appear that either of them ever signed it or assented to it, nor that either of them ever knew of its existence in the life of her husband; nor does it appear that either of them ever gave her husband the property or power to sell it.

3. That the supposed deed was not valid under the common law, which was introduced into the Territory January 19, 1816, is too obvious for comment. (1 Ter. Laws Missouri, p. 436.)

4. The facts in evidence did not authorize any presumption of the execution of the instrument by the married women. It

was insisted at the trial, that the supposed deed should be admitted, that it might be submitted to the jury, whether, under all the evidence in the cause, they would not presume a conveyance by them to the parties in possession. The position on the other side was this: That if the husband conveys the wife's lands, and possession is taken under the conveyance, and is continued for thirty years, and is open and notorious, and then the husband dies, any subsequent claim by the wife is overturned by the presumption of fact arising on these circumstances, that she has conveyed the property. To our minds this is a monstrous proposition. The discussion of it is undertaken with the apology, that it was pressed with a great deal of zeal at the trial, and is, perhaps, to constitute the principal point in the cause in this court. Nothing is more intelligible than the principle on which a conveyance is *presumed*. It is well stated, as follows: "The rational ground for presumption is, when the conduct of the party out of possession cannot be accounted for without supposing that the estate has been conveyed to the party in possession." (Kingston *v.* Lesly, 10 S. and R., 391.) "It is founded on the consideration, that the facts and circumstances are such as could not, according to the ordinary course of human affairs, occur without presuming a transfer of title, or an admission of an existing adverse title in the party in possession." (Jackson *v.* Porter, Paine R., 489.) "The presumption may always be rebutted by showing that the possession held or privilege exercised was perfectly consistent with the right or interest of the party who afterwards sets up the adverse claim." (Daniel *v.* North, 11 East R., 372.) "And this presumption in favor of a grant, and against written evidence of title, can never arise from mere neglect of the owner to assert his rights, where there has been no adverse title or enjoyment by those in whose favor the conveyance is to be presumed." (Schauber *v.* Jackson, 2 Wend., 37; Doe *v.* Butler, 3 Wend., 153; Lynde *v.* Dennison, 3 Conn., 396; Ricord *v.* Williams, 7 Wheaton, 109; Roberts on Frauds, p. 67, note.) "As soon as it appears that during the time in which it is presumed the party would have asserted his right, if he had one, that party was under a legal disability, which prevented or excused it, there is an end of the presumption." It may be necessary, *in this case*, to quote an authority, that when one *has had no power* to do an act, no presumption can arise that he did it. (Martin *v.* State of Tenn., 10 Humph., 157.)

Now, what was the condition of the persons here against whom presumptions are supposed to arise? Marie Collin was married in 1805, and so remained till March 22, 1840. Angelique Mallette was a married woman from 1804 till April 19,

1844. Helen Cerré was married at the date of the supposed deed, and so remained till 1838. The common law was introduced into the Territory of Missouri, January 19, 1816, (1 Ter. Laws Mo., 436,) and placed these women under all the disabilities belonging to that code. When their property was sold by their husbands, there was no possible mode in which they could interpose a legal objection. No remedy known to the law was within their reach, to redress the wrong done; their silence, then, is perfectly consistent with their rights. They seemed to acquiesce in the possession, because they could not help it. They could not sue; and reason would seem to indicate that in such case they should be excused for not suing. But just the reverse is the argument of the plaintiff in this court. He contends that the same law which put it out of their power to sue, at the same moment declared that if they did not sue, it must be presumed that they had surrendered their titles. "Why," said the adversary at the trial, "suppose they had sued, and their suits been dismissed, still they would have asserted their claim!" Such is the doctrine supposed to belong to the common law, which some are pleased to consider the perfection of reason. It requires what it forbids. It punishes, by nothing less than forfeiture, the *not doing* what it provides *shall not be done.* But this singular view is supposed to be supported by books. The plaintiff in error claims that it has been *so decided* in Melvin *v.* Proprietors of Locks and Canals on the Merrimack River, 16 Pick., p. 140. The case is this: Joana Fletcher, by her father's will, became in 1771 tenant in common of an undivided half of the premises in suit, and was in peaceful possession till her marriage to Benjamin Melvin, in February, 1777, when her husband in her right went into possession. In 1782, Melvin, the husband, conveyed the premises to Chambers, by a deed which, though signed by Joana, did not pass her title. The possession was taken, under the conveyance, and held peaceably by Chambers and those claiming under him, making valuable improvements, till after the year 1832, when one of Joana's sons brought suit, she having resided with her husband near the land, making no claim up to her death in 1826, and the husband making no claim up to his death in 1830. The court held there was no acquiescence on the part of Melvin and wife, or of their children, in Chambers's possession, for they had no right to interfere. They could not object to his erecting buildings. He was authorized to occupy the land according to his pleasure, therefore there was but slight ground to presume a subsequent grant from Melvin and wife, and that the *instruction to the jury was correct.* Now the instruction was, (see it, p. 137–'8,) that Chambers's

holding under Melvin, sen., in right of his wife, was valid and legal during the husband's life, and no presumption arose thereon against the plaintiff. Is it not then something singular that the court should discover still a *slight* ground of presumption? But so far there is nothing of moment in the case. The court proceeds, however, and in brief, p. 140, ascertains that the facts contain evidence of a conveyance from Joana to her husband prior to her marriage! It must be observed that Joana was in possession of the property as her own from the commencement of her title till her marriage. It was then passed out of her possession by the act of marriage, and though no presumptions could arise against her while married, *for she could make no objections*, yet, in the opinion of the court, it must be submitted to a jury, to say if they would not presume a conveyance by her, previous to her marriage to her husband! The course of the opinion was such as to indicate a predetermined purpose of the court to rob the plaintiff of his lands. And that purpose was carried out in 17 Pick., 259, when the case was again before the court. Facts which transpired after the marriage were allowed to go to the jury as evidence of a grant prior to the marriage!

It is well, perhaps, that there is one case on record in which an intelligent court has been found to set down, in a deliberate opinion, the absurdities of the doctrine contended for by the plaintiff.

In the case of Weatherhead's Lessee *v.* Boskerville, 11 Howard, 329, the subject was thoroughly discussed, and settled by an opinion of this court, in which a rule is laid down with reason and justice. The court say: "The rule in such case is, that when a person is under a legal incapacity to litigate a right in a court of justice, and there has been no relinquishment of it by contract, a release of it cannot be presumed from circumstances over which the person has had no control, happening before the incapacity to sue has been removed." A married woman "cannot sue without the assent and association of her husband, for any property which she owns, or to which she may become entitled in any of the ways in which that may occur." "For this cause it is, the statute of limitations does not run against her during coverture." She is presumed to "act under the coercion of her husband."

When there is a statute of limitation applicable to the case, presumptions are never permitted. "For to presume a grant in a case where the title would otherwise be protected by the statute, would be a plain evasion of the statute." (Cowen and Hill's Notes, p. 356–'7, note 311.)

3. It has been supposed that, in Missouri, the law in force at

the dissolution of the marriage by death, fixes the marital rights dependent on that event, and not the law which was in force at the time of the marriage. (Riddick *v.* Walsh, 15 Mo. R., 537–'8.)

This case, it is said, is broad enough to give to the husband a tenancy, by curtesy, in lands vested in the wife prior to the statute of Missouri, July, 1807, (1 Ter. Laws, 131, sec. 16,) which introduced that tenure amongst us. If this be the force of the case of Riddick *v.* Walsh, then the husbands of Madame Cerré and Madame Mallette, by virtue of the act July, 1807, the prior marriage and issue born, became tenants by curtesy, which was a particular estate for life in the husbands. (Reaume *v.* Chambers, 21 Mo., see Appendix; Alexander *v.* Warrance, 17 Mo. R., 229.)

The introduction of the common law in 1816, (1 Ter. Laws, 436,) though it did not give tenancy by curtesy to Madame Collin's husband, she never having had issue, did nevertheless, upon the above view of Riddick *v.* Walsh, give him an estate of freehold in the lands of his wife, determinable with her life. (2 Kent. Com., 130.)

If this view is correct, then the deed of Antoine Mallette and Pierre Cerré passed to Chouteau their life estates as tenants by the curtesy. And there was also outstanding in Louis Collin, during the whole of his life, a freehold estate, which was interposed between his wife and any claim by her to the land in controversy.

When the plaintiff, therefore, establishes that the husbands of Madame Cerré and Madame Mallette became tenants by curtesy, by force of the act of July, 1807, and that Louis Collin took a freehold by force of the common law introduced in 1816, he shows that the women in question had no title to the property in dispute while the husbands were living, and consequently that their causes of action did not accrue to them till they were respectively discovert.

Then, there is no possible ground upon which any presumption can rest. They had really no interest in the property—nothing to convey—nothing which the presumption of a conveyance can reach.

"Neither a descent, cast, nor the statute of limitations, will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainder-man cannot exist during the existence of the particular estate, and the laches of tenant for life will not affect the party entitled after him." (Jackson *v.* Schonemaker, 4 J. R., 402; Jackson *v.* Johnson, 5 Cowen, 75, 103.) "At common law, the alienation of husband seized

in right of the wife, discontinued the wife's estate." But by statute, 32 Henry 8, adopted in Missouri, (1 Ter. Laws, 436,) the contrary was provided. Since that statute, the husband's deed passes his own right, and the wife's stands intact as a reversion or remainder, so that her interest ceases during the coverture, and springs up again on its determination. (Jackson *v.* Sears, J. R., 435; Jackson *v.* Stearnes, 16 J. R., 110; Jackson *v.* Carnes, 20 J. R., 303; Miller *v.* Shackleford, 3 Dana, 289; S. C., 4 Dana, 278; Memmon *v.* Coldwell, 8 B. Mon., 33; Gill et al. *v.* Fauntleroy, Ib., 177; Gregory *v.* Ford, 5 B. Mon., 471; Martin *v.* Woods, 9 Mass., 360; Heath and Wife *v.* White, 5 Conn., 228; Jackson *v.* Swartout, 5 Cowen, 96; 1 Hilliard R. Est., 555.

4. The statute of limitations is no defence to this action. As early as December 17, 1818, the Territorial Legislature passed an act for limiting real actions, and it has been in force ever since. This act abolished all the rules of prescription known to the Spanish law, and substituted in lieu thereof its own period of twenty years after action accrued, and in case of disability by coverture, twenty years after disability removed. (1 Ter. Laws, 598; Landes *v.* Perkins, 12 Mo. R., 257; Youse *v.* Norcum, 12 Mo. R., 549; Biddle *v.* Mellon, 13 Mo. R., 335; Blair *v.* Smith, 16 Mo. R., 277; Jackson *v.* Cairnes, 20 J. R., 301; Jackson *v.* Selleck, 8 J. R., 262; Rev'd Stat. Mo., 1835, p. 392, art. 1, sec. 1, also sec. 4; Ib., 393, art 3, sec. 11; Reaume *v.* Chambers, Appendix.)

It would seem to be very plain, that whether the cause of action accrued to the women in 1820, when Mullanphy took possession of the premises, or at the moment when the life estates respectively of the husbands terminated, not one of their titles is cut off by the statute of limitations. In either case, the period of limitation would not be less than twenty years. If the cause of action accrued in 1820, the eleventh section of the third article of the "*Act prescribing the time for commencing actions*," approved March 16, 1835, (Rev'd Code, 1835, p. 396,) exempts their case from the operation of that act; and then, by the statute of 1818, (1 Ter. Laws, 598, and Rev'd Code of 1825, sec. 3, p. 511,) twenty years is allowed wherein to sue after discoverture.

And if the cause of action accrued at the termination of the life estate of the husbands, then, by all the statutes ever in force in Missouri, twenty years at least would be given wherein to sue.

It has always been held by our courts, that the enactment of the statute of limitations of 1818, and the introduction of the common law in 1816, not only abolished the rules of prescription under the Spanish law, but annulled the power

of married women and infants to bring any action while under disability. (Landes *v.* Perkins, 12 Mo. R., 257; Youse *v.* Norcum, 12 Mo. R., 549.)

4. Felix Pingal was entitled as tenant by the courtesy to his wife's lands, although neither the husband nor the wife was actually seized during the coverture. (4 Kent's Com., 29, 30; 1 Hilliard R. Est., 111; Reaume *v.* Chambers, Appendix.)

5. When a large amount of property is in controversy, desperate means are sometimes resorted to, for the purpose of holding possession. Such is the attempt to set up, in bar of this suit, the *pretended will of Francis Moreau.*

The Spanish law required a will to be produced before the judge, and proved by the attesting witnesses, within one month after the testator's death. The witnesses having been examined, the will was ordered to be protocoled (recorded.) (1 White's Recopilacion, 111; 2 Moreau and Carleton's Partidas, 975, 976, 977.) Francis Moreau had no right to give all his property to one child. He could not disinherit a child without cause, nor without naming expressly the child, and the reason of the disinherison. (2 Moreau and Carleton's Partidas, 1031, 1032, 1033; 1 White's Recopilacion, 107.) To entitle an heir to the benefit of a devise, it was necessary he should have performed the conditions annexed to it. (2 Moreau and Carleton Partidas, 997, and following; 1 White's Recopilacion, 103.) And it was also necessary he should appear before the judge, and plainly accept or reject the devise. (1 White's Recopilacion, 111, 127.) But this will, if it was ever seen by Francis Moreau, was *never produced to any judge after his decease—never shown to the pretended witnesses—never proved—never recorded—never accepted by the heir*, in the manner required by law.

And Joseph Moreau, who is made by it *universal heir*, never *performed any of the conditions* which it imposed upon him.

Joseph did, after his father's death, make claim to the succession, and for this he was imprisoned by the Lieutenant Governor.

It is most probable, therefore, that the pretended will was a forgery.

It is certain that Joseph Moreau, after his release from prison, acted towards the property of the estate, and towards his brothers and sisters, as if his father had died intestate, and the estate was settled and distributed as an intestate's estate. If the pretended will had been legally established, Joseph was estopped by his own acts against setting it up.

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error brings before us the judgment of the Circuit Court for the district of Missouri.

Boyle brought an action of trespass and ejectment in the Circuit Court for a common-field lot, in what was formerly known as the Big Prairie, of St. Louis, containing one arpent in front, on Broadway, in the city aforesaid, by the depth of forty arpens, running westwardly, being the same lot of land granted by the Spanish Government to Moreau, and confirmed to his representatives by the United States, and known as survey 1,480.

The defendant pleaded not guilty. A verdict of guilty was found against him for an undivided two-fifths of the land described.

A grant of the land claimed under the Spanish Government was proved to have been made to Francis Moreau, who occupied the land some time before his death, which took place in 1802. He left seven children surviving him—three sons and four daughters. His sons were named Joseph, Alexis, and Louis; his daughters, Manette, widow of one Cadeau, and afterwards wife of Louis Collin; Marie Louise, wife of Joseph Menard; Helen, who afterwards intermarried with Pierre Cerré; and Angelique, who intermarried with Notaine Mallette.

The plaintiff gave in evidence a sheriff's deed, dated the 24th of February, 1853, which recites a judgment in favor of David Clary and William Waddingham, against Angelique Mallette, Pierre Willemin, and Melanie Cerré, his wife, Felix Pingal and Josephine Cerré, his wife, by her guardian, for $455.31, on which an execution was issued, and levied on the defendant's land, designated as survey 1,480, and the same was sold the 19th of February, 1853, to the plaintiff Boyle, to whom the above deed was given, which purports to convey all the right and interest of the defendants.

The plaintiff proved that defendant had been in possession of the premises since 1839.

On the part of the defendant it was proved that, in the summer of 1820, John Mullanphy built a small brick house, which stands partly on the premises sued for, and partly on one of the common-field lots confirmed to Vien. Soon after the house was built, Mullanphy fenced three or four acres of ground, including the house. In 1822 or 1823, he enclosed fifteen or twer ty acres, and in 1835 or 1836, John O'Fallon, the executor of Mullanphy, induced Waddingham to enclose all the land claimed by the estate of Mullanphy in that neighborhood, which included the land sued for. The house and enclosures were rented to different persons from time to time, and were occupied with occasional intervals, sometimes of several months. In 1846 or 1847, Waddingham's fence fell down, and the tract

lay vacant and unenclosed for a year or two, when portions of it were enclosed by the heirs of Mullanphy.

At the trial, a paper was offered in evidence, purporting to be the deed of Joseph Moreau and others, heirs of Francis Moreau, deceased, dated the 3d of September, 1818, conveying to Pierre Chouteau all their estate and interest in the tract of land in the declaration described. A certificate of Thomas R. Musick, a justice of the peace, certifying that Joseph Menard and wife, Joseph Ortiz and his wife, signed the instrument, and acknowledged it to be their deed. There was also offered an instrument purporting to be a deed of Pierre Reaume and Marceline, his wife, and of Joseph Menard and Marie Louise Moreau, dated 6th November, 1819, conveying to Pierre Chouteau their interest in the land conveyed by their co-heirs, by the foregoing deed. Also, there was offered a certificate of Raphael Widen, notary public, of the acknowledgment of this instrument, the 6th November, 1819; and also a certificate that both the instruments were recorded 6th June, 1822.

It was proved that the above papers, after the death of John Mullanphy, came into the possession of John O'Fallon, having been found among the papers of the deceased.

The signatures to the first instrument were affixed by marks, the names being in the handwriting of F. M. Guyol and others.

Certain persons swore that they heard several of the heirs say they had sold their land to Pierre Chouteau. That Joseph Moreau lived in Louisiana in a destitute condition, where he died; and that he was never heard to claim any land in St. Louis, and, in fact, that he said he had sold his land in Missouri.

Pierre Chouteau and wife, on the 30th October, 1819, conveyed the tract in controversy to John Mullanphy by deed, which was duly acknowledged and recorded.

On the above evidence, the two deeds in 1818 and 1819 were offered in evidence, to which the plaintiff objected, "because the first deed was not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, under whom he claims, and that it did not convey any title of the femes covert."

The defendant then offered in evidence a copy of the will of François Moreau, certified by S. D. Barlow, recorder, to have been taken from among the archives of the French and Spanish Governments, deposited in his office, and filed for record on the 17th August, 1846, being archive 2,257. If the recorder had power to certify as to the deposit of the will, it does not appear by whom it was made, nor at what time.

This instrument states that in the year 1798, on the 2d August, we, Louis Collin, in default of a notary, went to the home of St. Francis Dunegant, captain commandant of St. Ferdinand, of Florisant, assisted by Antoine Rivierre and five others named; where St. François Moreau went with Joseph Moreau at my residence; the said Francis Dunegant and the said François Moreau declared and requested to make his last will, which he pronounced to us in a loud and intelligible voice, as follows, &c.: "Among other provisions, the testator names his son Joseph universal legatee, and afterwards declares it is with the reserve, that he shall reimburse to each of his brothers and sisters $27 silver out of the estate of their deceased mother, and it is declared that Joseph Moreau obliges himself to furnish certain articles annually to his father during his life." The testimoneum is as follows: Done and passed at St. Ferdinand, in Florisant, the day and year aforesaid, and signed (after being read) before Don Francis Dunegant, captain commanding, and the aforesaid witnesses; the said Francis Moreau made his ordinary mark, &c.

At the time of offering the will, the following deeds and documents were read in evidence, as bearing upon said will, and its admissibility in evidence: a deed dated 2d April, 1818, from Joseph Moreau and others, for a lot on Third street, town of St. Louis. In the deed it is stated that Joseph Menard, Aurora, the wife of Joseph Hortiz, are children of —— Moreau, alias Menard, deceased. Also, the inventory and account of sales of the estate of Francis Moreau, the inventory of the community property of Francis Moreau and wife, under the direction of Francis Dunegant, commandant, &c.

On the foregoing testimony the defendant moved the court to instruct the jury as follows:

1. If the jury find that Francis Moreau, in his lifetime, was the owner of the lot in controversy; that he died prior to 1804, and that his two daughters, Mrs. Mallette and Mrs. Cerré, took their husbands prior to 1804, then the several interests of said daughters in said lot became upon their marriage, and was their paraphernal property.

2. If the jury find, as mentioned in instruction No. 1, and further find, that in the year 1818, Mallette and Pierre Cerré, husbands of said daughters, made the deed read in evidence by the defendants, then, under the evidence in this cause, the jury may presume that said daughters gave the administration of said paraphernal property to their husbands, and that the same was alienated with their consent.

3. If the jury find, as mentioned in instruction No. 1, and further find, that defendants, and those under whom they

claim, have had open and continued possession of the lot in question for thirty years and more, before the beginning of this suit, claiming to own the same, then the plaintiff cannot recover any interest in said lot, derived by Mrs. Mallette or Mrs. Cerré from their said father.

4. If Mrs. Pingal was dead, leaving a child, at the time of the sheriff's sale, under which plaintiff claims, and during all the time of the coverture of said Mrs. Pingal the lot in controversy was in possession of defendants, and those under whom they claim, holding the same adversely to Mrs. Pingal and her husband, and there never was any entry upon the part of the wife or husband, then the plaintiff derived no title to the lot in controversy under Mrs. Pingal or her husband.

The court gave the first instruction, and refused the others, to which refusal exception was taken.

It is argued that the deed of the heirs of Moreau to Chouteau, dated September 3, 1818, and that offered as the act of Pierre Reaume and wife, dated 6th November, 1819, ought to have been admitted in evidence; that the execution of the last-mentioned deed was fully proved by proof of the death of the subscribing witnesses and their handwriting.

Some of the grantors in this deed acknowledged the execution of it before Thomas R. Musick, a justice of the peace, but there was no proof that Angelique or Helen Cerré, or Marie Collin, had signed or acknowledged the deed, and these were the heirs under which the plaintiff claims. It was proved by Colonel O'Fallon, that he was the executor of John Mullanphy, and that in 1833 he received from the son of the deceased the title-papers of the estate, among which was the above original deed, with certain endorsements. And it was proved that the deed was in the handwriting of Guyol, a justice of the peace, with whose handwriting he was well acquainted. It was also proved that the signatures, Antoine Mallette, Pierre Cerré, and Joseph Moreau, were in the handwriting of Guyol, and that of Marie Collin in the handwriting of her husband, Louis Collin; the signature, Ellen Moreau, the wife of Pierre Cerré, is in the handwriting of Hawley. Guyol, the witness states, was a man of good character. There was some proof that Pierre Cerré and Antoine Mallette, after the date of said paper, stated often that they had sold their land to Pierre Chouteau, sen.; but there appears to be no proof that Angelique Mallette, or Helen Cerré, or Marie Collin, had ever stated or admitted that they had parted with their interest in the land.

One of the defendant's witnesses stated that Joseph Moreau said, that, after the decease of his father, he set up a claim to

the succession, and that he was imprisoned for doing so, and that Pierre Chouteau had him released. Some evidence was given as to the deed having been deposited in the recorder's office for record, and an endorsement that it was to be handed to Mullanphy.

The common law was adopted in the Missouri Territory in 1816, and consequently it governs all subsequent legal transactions.

The children of Moreau, being seven at the time of his decease, were reduced, by the death of Louis, intestate, and Marie, who also died intestate, to five. And it seems that the plaintiff derived his title from two of the surviving daughters, Angelique and Helen, and their heirs; he therefore claims under Louis, Marie, Helen, and Angelique. It seems not to be contested that the property vested in the daughters, under the civil law, was paraphernal. A succession accruing to the wife during marriage is her paraphernal property, which she may administer without the consent or control of her husband. (O'Conner *v.* Barre, 3 Martin Lou. Rep., 455.) The wife may give the control of this property, in writing, to her husband. (1 White's New Recopilacion, 56, note 33.)

The Circuit Court committed no error in excluding from the jury the above deed. The execution of it, by the parties under whom the plaintiff claims, is not proved, nor do the facts relied on, from which a presumption is attempted to be drawn in favor of its validity, authorize such presumption. The femes covert were under disabilities. They could only divest themselves of their rights in the mode specially authorized. Their husbands had no power, without their concurrence and action, to convey their real estate.

The defendant offered to read a certified copy of the deed, to show its condition at the time it was recorded, but the court refused to permit such copy to be read. If the original deed was not evidence, it is difficult to perceive for what legal purpose a recorded copy of it could be read. There was no error in this ruling by the court.

There was no evidence that the will had been proved, or that the conditions stated in it had been complied with.

A deed dated 2d April, 1813, from Joseph Moreau and his brothers and sisters, conveying to Hempstead and Farrar a lot which would have passed by the supposed will to Joseph Moreau, had it been operative. Also, there was shown a sale bill of the personal property of the estate on the 19th of April, 1803, Joseph Moreau being present, and that he purchased a part of the property devised to him by the will.

Also, it was shown that an administrator was duly appointed

on the estate of Francis Moreau, and his estate was administered in the same manner as if he had died intestate.

By the Spanish law, a will was required to be proved by the attesting witnesses within one month after the decease of the testator; and, when proved, it is required to be recorded. (1 White's Recopilacion, 111; 2 Moreau and Carleton's Partidas, 975–'6–'7.) The testator cannot disinherit a child without naming the child, and the reasons for doing so. (1 White's Re., 107.) No heir can claim a devise, without performing the condition annexed to it. (1 White's Re., 103.) It is required that he shall appear before the judge, and either accept or reject the devise. (1 White's Re., 111, 127.) None of these requisites were performed by Joseph Moreau, who was made, by the will, universal heir.

If the will was a genuine instrument, and Joseph was the universal heir, it could not have remained dormant, it would seem, for fifty years, or in the archives, without being brought to the light, and having on it some judicial action. But whether it be a genuine instrument or not, it has not been treated as valid, as no claim has been set up under it, and all the heirs have acted, in regard to the estate of their father, as though he had died intestate.

Neither the deed to Chouteau, nor the will, can be admitted in evidence, without proof, as an ancient instrument. The rule embraces no instrument which is not valid upon its face, and which does not contain every essential requirement of the law under which it was made. Neither the deed nor the will comes within the rule, and we think the court very properly excluded them both from the jury.

In regard to the second, third, and fourth instructions, which the court refused to give to the jury, there was no error.

As early as December 17, 1818, the Territorial Legislature passed an act limiting real actions, which remains in force. The act abolished all the rules of prescription under the Spanish law, and substituted a limitation of twenty years after action accrued, and, in case of disability by coverture, twenty years after it ceased. In 1820, it appears Mullanphy took possession of a part of the premises in controversy, and from that time retained possession. Some of the husbands had a life estate in the lands; but whether this was so or not is immaterial, as there is no bar to the claim of the plaintiff by the statute of limitations.

By an act "prescribing the time for commencing actions," approved March 10, 1835, (Revised Code, 396,) it is declared, in the 11th section, that "the provisions of this act shall not apply to any action commenced, nor to any cause where the

right of action or entry shall have accrued, before the time when this act takes effect, but the same shall remain subject to the laws now in force."

It will be observed, that the limitation act of 1818, being still in force, cannot operate on any of the femes covert of whom the plaintiff claims. It did not begin to run against them until they became discovert, from which time it required twenty years to bar their right. Under such circumstances, no presumption can arise against them, as they had no power to prosecute any one who entered upon their land. No laches can be charged against them until discoverture; and there is no ground to say that either the statute or lapse of time, since that period, can affect the rights of the plaintiff, or of those under whom he claims. The court, therefore, did not err in refusing to give to the jury the instructions requested.

Upon the whole, the judgment of the Circuit Court is affirmed, with costs.

WILLIAM E. POST AND OTHERS, CLAIMANTS OF A PORTION OF THE CARGO OF THE SHIP RICHMOND, APPELLANTS, *v.* JOHN H. JONES AND OTHERS, LIBELLANTS.

It cannot be doubted that a master has power to sell both vessel and cargo, in certain cases of absolute necessity.

But this rule had no application to a wreck where the property is deserted, or about to become so, and the person who has it in his power to save the crew, and salve the cargo, prefers to drive a bargain with the master, and where the necessity is imperative, because it is the price of safety.

No valid reason can be assigned for fixing the reward for salving derelict property at "not more than a half or less than a third of the property saved." The true principle in all cases is, adequate reward according to the circumstances of the case.

Where the property salved was transported by the salvors from Behring's Straits to the Sandwich Islands, and thence to New York, the salvage service was complete when the property was brought to a port of safety. The court allowed the salvors the one-half for this service, and also freight on the other moiety from the Sandwich Islands to New York.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

It was a libel filed by the owners of the ship Richmond and cargo, under circumstances which are particularly stated in the opinion of the court.

The District Court dismissed the libel, thereby affirming the sales.

The Circuit Court reversed this decree, and declared the